A

PP

v.

PETER ANDREW HAMILTON

B

HIGH COURT MALAYA, KUALA LUMPUR
LIM YEE LAN JC
[CRIMINAL REVISION NO: 43-43-05]
21 APRIL 2006

C ***CRIMINAL PROCEDURE:*** *Revision - Court's inherent revisionary powers - Application for revision of order allowing release of accused's passport - Whether there was a specific procedure in Criminal Procedure Code on how an accused person should apply for alteration or removal of a condition of his bail - Whether must be by way of a miscellaneous* D *criminal application - Whether judge exercised discretion improperly in making said order*

On 24 January 2005, the accused, an Australian citizen, was charged in the Kuala Lumpur Sessions Court ('Court') under E s. 409 of the Penal Code for criminal breach of trust of an amount of RM184,010. He was released on bail pending his trial on a security of RM50,000 and also surrendered his Australian passport to the Court as one of the conditions of his bail. On 28 April 2005, the Court, on the accused's application, made an F order allowing the release of his passport for the purpose of his overseas trips. The order stipulated, *inter alia*, that the accused could obtain the release of his passport by letter addressed to the Court containing details of his intended trip such as the place, date and duration of the visit together with flight details, with a G copy of the letter to the Deputy Public Prosecutor's office to be duly acknowledged. Dissatisfied with the decision of the learned Sessions Court Judge ('SCJ'), the Public Prosecutor requested that this court exercise its power of revision in relation to the aforesaid terms of the order on the ground that whenever an H accused person's passport is surrendered to the Court as a condition of his bail, the proper procedure, each time he requires the release of the passport, is for him to apply to the Court by way of a miscellaneous criminal application for its release so that the Public Prosecutor can be represented to make its views known to the Court. I

Held (dismissing the application):

(1) There was no reason for the exercise of this court's power of revision on the following grounds: (i) the then Supreme Court's decision in *PP v. Dato' Mat* was directly applicable to the issue raised by the Public Prosecutor in this case. In that case, the Supreme Court held firstly, that it was well within the jurisdiction of a court that has earlier granted bail, or the High Court in its supervisory or revisionary power, to alter any condition of a bail based on an application by the accused and secondly, that there is no specific procedure laid down in the Criminal Procedure Code on how an accused person should apply for the alteration or removal of a condition of his bail, including, for example, the return of his passport for making overseas trips. Consequently, the prosecution's contention in the present application that it had to be by way of a miscellaneous criminal application was misconceived; and (ii) the order was made after hearing submissions from all relevant parties and, furthermore, the learned SCJ had, on the insistence of the learned Deputy Public Prosecutor, imposed a new condition that the accused must attend the Malaysian Embassy or Consulate in the country that he was visiting and get its endorsement once in every two weeks throughout the duration of his stay there. In addition, the existing condition of his bail that while in Malaysia he had to report to the nearest police station once in every two weeks still remained. In all the circumstances of this case, it could not therefore be said that the learned SCJ had exercised her discretion improperly or capriciously when making the order as she had in mind other conditions to secure the attendance of the accused in Court for the trial. The defence counsel informed this court that since the order was made on 28 April 2005, the accused had made eight short trips out of this country mainly for business purposes and to visit his wife and young child in China, and had complied with all the conditions imposed by the Court on every occasion. The accused should know better than to jeopardize the conditions of his bail, a breach of which would attract serious consequences resulting in a cancellation of his bail and/or forfeiture of his security. (paras 6, 7, 8 & 9)

Case(s) referred to:
Lim Kiap Khee v. PP [1987] 2 CLJ 442; [1987] CLJ (Rep) 717 HC ***(refd)***
PP v. Dato' Mat Safuan [1991] 1 CLJ 385; [1991] 2 CLJ (Rep) 1112 SC ***(refd)***

Legislation referred to:
Penal Code, s. 409

For the accused - G Gunaseelan Ganesan; M/s G Gunaseelan & Assoc
For the prosecution - Yusaini Amer Abd Karim DPP

Reported by Suresh Nathan

JUDGMENT

Lim Yee Lan JC:

[1] On 24 January 2005, the accused, an Australian citizen, was charged in the Kuala Lumpur Sessions Court under s. 409 of the Penal Code for criminal breach of trust of an amount of RM184,010. He was released on bail pending his trial on a security of RM50,000 and also surrendered to the court his Australian passport as one of the conditions of his bail.

[2] On 28 April 2005 on the application of the accused the Kuala Lumpur Sessions Court made an order allowing the release of his passport for the purpose of his overseas trips subject to the following terms.

[3] The order stipulated, *inter alia*, that the accused could obtain the release of his passport by letter addressed to the said court containing details of his intended trip such as the place, date and duration of the visit together with flight details with a copy of the letter to the Deputy Public Prosecutor's office to be duly acknowledged.

[4] Dissatisfied with the decision of the learned Sessions Court Judge, the Public Prosecutor *vide* a letter dated 5 December 2005 requested that this court exercise its power of revision in relation to the aforesaid term of the order on the ground that whenever an accused person's passport is surrendered to the court as a condition of his bail, the proper procedure, each time he requires the release of the passport, is for him to apply to the court by way of a miscellaneous criminal application for its release so that

the Public Prosecutor can be represented to make its view known to the court. The Sessions Court Judge therefore erred in law when she granted the application of the accused for the release of his passport for his overseas trips merely by way of a letter addressed to the court.

[5] Before this court both the learned Deputy Public Prosecutor, Encik Yusaini Amer bin Abdul Karim and the learned defence counsel Mr. G. Gunaseelan conceded in their submission that they could not find any express provision in the Criminal Procedure Code laying down such a procedure and there is a dearth of Malaysian authorities on this area, except for the two cases of *Lim Kiap Khee v. Public Prosecutor* [1987] 2 CLJ 442; [1987] CLJ (Rep) 717 (which is irrelevant to this case as the issue in that case is whether the Sessions Court can order the passport of an accused to be impounded) and the then Supreme Court's decision in *PP v. Dato' Mat Safuan* [1991] 1 CLJ 385; [1991] 2 CLJ (Rep) 1112.

[6] Having heard the submission of both parties and having perused the record of proceedings of the Sessions Court, I see no reason to exercise my power of revision in this matter, based on the following grounds.

[7] I am of the view that the then Supreme Court's decision in *PP v. Dato' Mat* is directly applicable to the issue raised by the Public Prosecutor in this case. In that case the Supreme Court held firstly, that it was well within the jurisdiction of a court that has earlier granted the bail, or the High Court in its supervisory or revisionary power, to alter any condition of a bail based on an application by the accused and secondly, that there is no specific procedure laid down in the Criminal Procedure Code on how an accused person should apply for the alteration or removal of a condition of his bail, including, for example, the return of his passport for making overseas trips. Consequently, the prosecution's contention in the present application that it has to be by way of a miscellaneous criminal application is misconceived.

[8] The next question is whether, bearing in mind that the accused is a foreign citizen, and the fact that the surrender of his passport is a supplemental or adjunctive security to secure his attendance in the Kuala Lumpur Sessions Court for his trial under the charge he is facing, the learned Sessions Court Judge had exercised her discretion properly or correctly when she decided

that the accused can apply to the court for its release for his overseas trips merely by way of a letter with a copy to the office of the Public Prosecutor. In other words, will the said condition imposed by the learned Sessions Court undermine or prejudice the supplemental or adjunctive security given by the accused in this case and increase the chance or possibility of his absconding to avoid his trial?

[9] It must be mentioned that in this case the order of the learned Sessions Court Judge was made after hearing submission from the learned Deputy Public Prosecutor, Puan Melissa and learned defence counsel Encik G. Gunaseelan. Besides this condition the learned Sessions Court Judge had, on the insistence of the learned Deputy Public Prosecutor, imposed a new condition that the accused must attend the Malaysian Embassy or Consulate in the country that he is currently visiting and get its endorsement once in every two weeks throughout the duration of his stay there. In addition, the existing condition of his bail that while in Malaysia he has to report to the nearest police station once in every two weeks still remains. In all the circumstances of this case, it could not therefore be said that the learned Sessions Court had exercised her discretion improperly or capriciously when making the order as she had in mind other conditions to secure the attendance of the accused in court for the trial. The defence counsel informed this court that since the order was made on 28 April 2005 the accused has made eight (8) short trips out of this country mainly for business purposes and to visit his wife and young child who are residing in China and on every occasion has complied with all the conditions imposed by the court. I do believe the accused should know better than to jeopardize the conditions of his bail as a breach of which will attract serious consequences resulting in a cancellation of his bail and/or forfeiture of his security.

[10] Based on the foregoing reasons I see no reason to exercise my power of revision and I hereby dismiss the application of the Public Prosecutor for a revision of the order of the learned Kuala Lumpur Sessions Court Judge.